



April 2, 2002

Mr. Wiley B. McAfee
Police Legal Advisor
City of Irving
P.O. Box 152288
Irving, Texas 75015-2288

OR2002-1618

Dear Mr. McAfee:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 160664.

The City of Irving and the Irving Police Department (collectively referred to as the "city") received a request for twenty-two items of information. You claim that you have released some of the responsive information. You also state that you do not have information responsive to some of the items of the request.¹ However, you indicate that this office has previously determined that some of the information is excepted from disclosure. Furthermore, you claim that the remainder of the requested information is excepted from disclosure under sections 552.101, 552.102, 552.103, 552.108, 552.111, 552.117, and 552.305 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.²

We begin by noting that you have not provided this office with any information specifically responsive to item 13 of the instant request, which seeks "[a]ny and all documents, documentation, records, video, diagrams, maps, models of the termination proceedings of officer Webb, including the transcript of the proceedings of officer Webb." You state that

¹We note that the Public Information Act does not require a governmental body to disclose information that did not exist at the time the request was received. *Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex. Civ. App.—San Antonio 1978, writ dismissed); Open Records Decision No. 452 at 3 (1986).

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

the termination of Officer Webb was based on documents that this office has already ruled upon. However, you do not indicate whether the city has any other information responsive to item 13 of the request. To the extent the city possesses information responsive to this request that this office has not already ruled upon, we have no basis for finding the information is excepted from disclosure because you have not submitted it for our review. Consequently, you must release such information pursuant to section 552.302 of the Government Code.

Next, we address your contention that the instant request encompasses, in part, the same information already ruled upon by this office in Open Records Letter No. 2001-3140 (2001). In Open Records Letter No. 2001-3140 (2001), we ruled on information responsive to a request identical to items 1 through 11 of the instant request. Upon review of the information you have provided, we find that most of the information submitted as responsive to items 1 through 11 of the instant request is the same information ruled upon in Open Records Letter No. 2001-3140 (2001). Furthermore, we find that, generally, the facts and circumstances surrounding Open Records Letter No. 2001-3140 (2001) have not changed since the issuance of that ruling. Thus, you may rely on Open Records Letter No. 2001-3140 (2001) to withhold most of the information you have submitted in response to items 1 through 11 of this request.³

However, you indicate that the circumstances surrounding our decision on your argument under section 552.108 of the Government Code have changed since the issuance of Open Records Letter No. 2001-3140 (2001). In our previous decision, we found that information responsive to item 9 of the request could generally be withheld under section 552.108 because it related to ongoing criminal investigations into the conduct of police officers Webb and Bollin. You state that Officer Webb has since received deferred adjudication. However, you also state that the case against Officer Bollin remains pending. While the facts surrounding our section 552.108 finding have changed slightly since the issuance of Open Records Letter No. 2001-3140 (2001), we find that the information responsive to item 9 still relates to the pending case against Officer Bollin, and may therefore be withheld under section 552.108(a)(1).⁴ See *Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases).

We again note that information normally found on the front page of an offense report is generally considered public. See generally Gov't Code § 552.108(c); *Houston Chronicle*

³It appears that the information responsive to item 21 of the request and some of the information responsive to item 19 of the request is identical to the information this office ruled upon in Open Records Letter No. 2001-3140 (2001).

⁴You indicate that the information responsive to item 9 of the request is likewise responsive to item 14.

Publ'g Co. v. City of Houston, 531 S.W.2d 177 (Tex. Civ. App.--Houston [14th Dist.] 1975), writ *ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976); Open Records Decision No. 127 (1976). Thus, you must release the type of information that is considered to be front page offense report information, even if this information is not actually located on the front page of an offense report.

In addition, one of the documents submitted as responsive to item 5 of the request did not exist until after the city received the request that we ruled upon in Open Records Letter No. 2001-3140 (2001). This new information is not subject to our previous determination. Thus, we will address the exceptions you assert for this information together with your arguments for withholding the information responsive to items 12, 19, 20, and 22 of the request.

Initially, we note that some of the information submitted in response to item 19 of the request is subject to section 552.022 of the Government Code. Section 552.022 provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

(1) a completed report, audit, evaluation, or investigation made of, for, or by a governmental body, except as provided by Section 552.108

Gov't Code § 552.022(a)(1). The information responsive to item 19 contains completed reports and evaluations that must be released unless they are confidential under other law or are excepted from disclosure under section 552.108 of the Government Code. Sections 552.103 and 552.111 of the Government Code are discretionary exceptions and not "other law" for the purpose of section 552.022. Open Records Decision No. 663 (1999) (governmental body may waive sections 552.103 and 552.111). Thus, the completed reports and evaluations may not be withheld under either section 552.103 or section 552.111. Nevertheless, we will address the remainder of the exceptions you raise with respect to the completed reports and evaluations.

First, however, we note that the information submitted as responsive to item 22 of the request contains polygraph information that must be withheld under section 552.101 of the Government Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 1703.306 of the Occupations Code governs the release of polygraph information and provides:

(a) A polygraph examiner, trainee, or employee of a polygraph examiner, or a person for whom a polygraph examination is conducted or an employee of the person, may not disclose information acquired from a polygraph examination to another person other than:

- (1) the examinee or any other person specifically designated in writing by the examinee;
- (2) the person that requested the examination;
- (3) a member, or the member's agent, of a governmental agency that licenses a polygraph examiner or supervises or control a polygraph examiner's activities;
- (4) another polygraph examiner in private consultation; or
- (5) any other person required by due process of law.

(b) The board or any other governmental agency that acquires information from a polygraph examination under this section shall maintain the confidentiality of the information.

Occ. Code § 1703.306. This provision prohibits the release of polygraph information to anyone other than those individuals listed in subsection (a). We have marked the polygraph examination information that is confidential pursuant to section 1703.306 of the Occupations Code and must be withheld under section 552.101 of the Government Code unless one of the release provisions in subsection (a) applies.

We also note that the information you have submitted as responsive to item 19 of the request contains peace officers' accident reports. Section 550.065(b) of the Transportation Code states that except as provided by subsection (c), accident reports are privileged and confidential. The Seventy-seventh Legislature amended section 550.065(c)(4) to provide for release of accident reports to a person who provides two of the following three pieces of information: (1) date of the accident; (2) name of any person involved in the accident; and (3) specific location of the accident. *See* Act of May 22, 2001, 77th Leg., R.S., H.B. 1544, § 5 (to be codified at Transp. Code § 550.065(c)(4)). Under this provision, the Department of Public Safety or another governmental entity is required to release a copy of an accident report to a person who provides the agency with two or more pieces of information specified by the statute. *Id.* In the situation at hand, the requestor has not provided the department with two of the three pieces of information. Thus, you must withhold the marked accident reports under section 550.065(b).

Next, you contend that the remainder of the information responsive to item 19 as well as the new information responsive to item 5 is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. Section 143.089 of the Local Government Code provides in pertinent part:

(a) The director [of the fire fighters' or police officers' civil service] or the director's designee shall maintain a personnel file on each fire fighter and police officer. The personnel file must contain any letter, memorandum, or document relating to:

....

(2) any misconduct by the fire fighter or police officer if the letter, memorandum, or document is from the employing department and if the misconduct resulted in disciplinary action by the employing department in accordance with this chapter

....

(g) A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

Thus, section 143.089 of the Local Government Code provides for the creation of two personnel files for police officers and fire fighters: one that must be maintained by the city's civil service director or his designee and another that may be maintained by the city's fire and police departments. Information contained in personnel files maintained by the civil service director in accordance with chapter 143, including all records from the employing police department relating to misconduct by police officers that resulted in disciplinary action, must be released to the public unless the information comes within one of the Public Information Act's exceptions to required public disclosure. However, information contained in a personnel file held by the police department is confidential pursuant to section 143.089(g) and may not be disclosed under the Act.

You indicate that the information responsive to items 5 and 19 is part of the police department's personnel files and therefore is confidential under section 143.089(g) of the Local Government Code. Based on your contention that this information is contained in

the police department's personnel file, we agree that most of the information responsive to items 5 and 19 is confidential under section 143.089(g). However, we note that some of the information responsive to item 19 consists of periodic evaluations of Officer Bollin as well as commendations and congratulations bestowed on Officer Bollin. Furthermore, the information responsive to item 19 contains information relating to misconduct of Officer Bollin that resulted in his suspension. While this information, which we have marked, may be kept in the police department's personnel file, it must also be kept in the civil service personnel file. Local Gov't Code §§ 143.052, .089(a)(2), (3). Therefore, although the evaluations, commendations, congratulations, and information relating to Officer Bollin's suspension in the police department's personnel file are confidential under section 143.089(g), the evaluations, commendations, congratulations, and information relating to Officer Bollin's suspension in the civil service personnel file are not confidential under that provision. *Id.* § 143.089(a), (g).

Nevertheless, you also argue that the evaluations, commendations, congratulations, and information relating to Officer Bollin's suspension are excepted from disclosure under section 552.103 of the Government Code. As we noted above, the completed evaluations are subject to section 552.022(a)(1), and therefore may not be withheld under section 552.103. However, we will address your section 552.103 argument with respect to the commendations, congratulations, and information relating to Officer Bollin's suspension as well as the information responsive to items 12, 20, and 22 of the request. Section 552.103 provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

The city has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation is pending or reasonably anticipated, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.--Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684

S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). The city must meet both prongs of this test for information to be excepted under 552.103(a).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is more than mere conjecture." Open Records Decision No. 452 at 4 (1986). In Open Records Decision No. 638 (1996), this office stated that a governmental body has met its burden of showing that litigation is reasonably anticipated when it received a notice of claim letter and the governmental body represents that the notice of claim letter is in compliance with the requirements of the Texas Tort Claims Act ("TTCA"), Civ. Prac. & Rem. Code, ch. 101, or an applicable municipal ordinance.

You state that, on May 3, 2001, the requestor filed a Notice of Claim against the city that complies with the notice requirements of the Texas Tort Claims Act. Based on the information you have provided, we agree that litigation against the city is reasonably anticipated. Furthermore, we find that the commendations, congratulations, and information relating to Officer Bollin's suspension submitted in response to item 19 as well as all of the information responsive to items 12, 20, and 22 relate to reasonably anticipated litigation and are excepted from disclosure under section 552.103.

We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the anticipated litigation is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

With respect to the completed evaluations responsive to item 19, you also contend that the information is confidential under common-law privacy. Section 552.101 of the Government Code encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. Based on our review of the submitted evaluations responsive to item 19, we find that none of the evaluations is protected under the doctrine of common-law privacy. See Open Records Decision No. 405 at 2-3 (1983) (public has interest in manner in which public employee performs his job).

You also contend that the evaluations responsive to item 19 are confidential under section 261.201 of the Family Code. Section 261.201(a) of the Family Code provides as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Although you previously demonstrated that certain criminal records pertaining to a sexual assault of a child were confidential under section 261.201 of the Family Code, you do not demonstrate, nor is it apparent, that the completed evaluations at issue were used in an investigation of child abuse or neglect. Therefore, we find that the evaluations responsive to item 19 of the request are not confidential under section 261.201 of the Family Code.

Next, you contend that the completed evaluations responsive to item 19 are confidential under section 773.091 of the Family Code. Section 773.091 provides:

(a) A communication between certified emergency medical services personnel or a physician providing medical supervision and a patient that is made in the course of providing emergency medical services to the patient is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

You do not explain, nor is it apparent, how the evaluations at issue relate to emergency medical services. Thus, we find that the evaluations responsive to item 19 are not confidential under section 773.091 of the Health and Safety Code.

You also argue that the evaluations are confidential under chapter 772 of the Health and Safety Code as 9-1-1 subscriber information. Chapter 772 of the Health and Safety Code authorizes the development of local emergency communications districts. Sections 772.118, 772.218, and 772.318 of the Health and Safety Code make confidential the originating telephone numbers and addresses of 9-1-1 callers furnished by a service supplier. *See* Open Records Decision No. 649 (1996). The evaluations responsive to item 19 do not contain originating telephone numbers or addresses of 9-1-1 callers. Thus, the city may not withhold any portion of the evaluations under chapter 772 of the Health and Safety Code.

Next, you contend that the evaluations responsive to item 19 are excepted from disclosure under section 552.108 of the Government Code. Section 552.108(a) excepts from disclosure “[i]nformation held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime . . . if: (1) release of the information would interfere with the detection, investigation, or prosecution of crime.” Generally, a governmental body claiming section 552.108 must reasonably explain, if the information does not supply the explanation on its face, how and why the release of the requested information would interfere with law enforcement. *See* Gov’t Code §§ 552.108(a)(1), (b)(1), .301(e)(1)(A); *see also Ex parte Pruitt*, 551 S.W.2d 706 (Tex. 1977). As we stated earlier, you have adequately demonstrated that some information relating to a criminal investigation of Officer Bollin is excepted from disclosure because the criminal case is still pending. You also contend that the prosecution of the sexual assault case is still pending. However, you do not explain, nor is it apparent, how the completed evaluations at issue relate to either pending criminal case. Consequently, we find that you may not withhold the evaluations responsive to item 19 under section 552.108 of the Government Code.

Finally, you contend that the completed evaluations at issue are excepted from disclosure under section 552.117 of the Government Code. Section 552.117 provides, in part:

Information is excepted from [required disclosure] if it is information that relates to the home address, home telephone number, or social security number of the following person or that reveal whether the person has family members:

...

(2) a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code, regardless of whether the officer complies with Section 552.024 or 552.1175, as applicable

The submitted evaluations responsive to item 19 do not contain the home address, home telephone number, social security number, or family member information of a peace officer

or any other public employee. Thus, no portion of the evaluations may be withheld under section 552.117. Rather, because you have not demonstrated and it does not appear that the submitted evaluations responsive to item 19 of the request are excepted from disclosure, we find the city must release these evaluations, which we have marked.

In conclusion, you may rely on our previous determination in Open Records Letter No. 2001-3140 (2001) to withhold most of the information responsive to items 1 through 11 of the instant request for information. You may withhold the information responsive to item 9 under section 552.108(a)(1) of the Government Code. You must also withhold the new information responsive to item 5 under section 552.101 of the Government Code in conjunction with section 143.089(g) of the Local Government Code. You must withhold the marked accident reports contained in the information responsive to item 19 of the request under section 552.101 of the Government Code and section 550.065(b) of the Transportation Code. You must withhold the remainder of the information submitted as responsive to item 19, with the exception of the completed evaluations, the commendations and congratulations, and the information relating to Officer Bollin's suspension, under section 552.101 of the Government Code and section 143.089(g) of the Local Government Code. You may withhold the information responsive to item 19 relating to Officer Bollin's suspension under section 552.103 of the Government Code. You may also withhold the commendations and congratulations submitted in response to item 19 under section 552.103. However, you must release the marked completed evaluations responsive to item 19 of the request. You must withhold the marked polygraph examination information responsive to item 22 of the request under section 552.101 of the Government Code and section 1703.306 of the Occupations Code. Finally, you may withhold the remainder of the information responsive to item 22 as well as all of the information responsive to items 12 and 20 under section 552.103 of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



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Assistant Attorney General
Open Records Division

NEB/sdk

Ref: ID# 160664

Enc: Submitted documents

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